FILED
FEB 2 - 2005
OFFICE OF THE CLERK

(3)

No. 04-589

In the Supreme Court of the United States

THE BRINK'S COMPANY, FKA THE PITTSTON COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
JONATHAN H. LEVY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, Tit. XIX, Subtit. C, §§ 19141-19143, 106 Stat. 3036-3056 (26 U.S.C. 9701 *et seq.*) (Coal Act), requires petitioners to make payments into a statutorily-created fund. That fund provides health benefits for retired coal miners and their dependents, including specified miners assigned to petitioners by the Commissioner of Social Security. The questions presented for review are as follows:

1. Whether the Coal Act unconstitutionally vests governmental authority in the private persons who administer the fund that Congress created to receive Coal Act payments.

2. Whether this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 511 (1998), which held the Coal Act to be unconstitutional as applied to certain coal operators other than petitioners, effectively requires that the Act be invalidated in its entirety.

3. Whether the Coal Act permits the assignment to petitioners of liability for retired miners whose original assignments to other coal operators were voided as unconstitutional following *Eastern Enterprises*.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	21

TABLE OF AUTHORITIES

Cases:

A.T. Massey Coal Co. v. *Massanari*, 305 F.3d 226 (4th Cir. 2002), cert. denied, 538 U.S. 1012 (2003) .. 10

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987) 15

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 6, 15, 18

Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 15

Bay Area Laundry & Dry Cleaning Pension Trust Fund v. *Ferbar Corp.*, 522 U.S. 192 (1997) 11, 12

Buckley v. *Valeo*, 424 U.S. 1 (1976) 12, 13

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 9

Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 2

Heckler v. *Community Health Servs.*, 467 U.S. 51 (1984) 12

Holland v. *Big River Minerals Corp.*, 181 F.3d 597 (4th Cir. 1999), cert. denied, 528 U.S. 1117 (2000) 2

Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) 14

Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) 12

United States v. *La Franca*, 282 U.S. 568 (1931) 10

Case—Continued: Page

Vermont Agency for Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 11

Constitution and statutes:

U.S. Const. Amend. V 17
Due Process Clause 35
Just Compensation Clause 5

Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, Tit. XIX , Subtit. C, §§ 19141-19143, 106 Stat. 3036-3056 (26 U.S.C. 9701 *et seq.*):

26 U.S.C. 9701(c)(1) 17
26 U.S.C. 9701(c)(2) 3
26 U.S.C. 9701(a)(1) 17
26 U.S.C. 9701 note (§ 19142, 106 Stat. 3037) 2
26 U.S.C. 9702 2
26 U.S.C. 9702(a)(2) 2, 7
26 U.S.C. 9702(a)(3) 3, 17
26 U.S.C. 9703(b)(1) 3
26 U.S.C. 9704(b)(2) 10
26 U.S.C. 9704(d) 4
26 U.S.C. 9705 4
26 U.S.C. 9706(a) 3, 4, 9, 16, 18
26 U.S.C. 9706(a)(1)-(3) 5, 18, 20
26 U.S.C. 9706(a)(2) 19
26 U.S.C. 9706(a)(3) 19
26 U.S.C. 9706(e)(2) 4
26 U.S.C. 9706(f) 4, 10
26 U.S.C. 9706(f)(5) 4
26 U.S.C. 9707 ..... 4, 13
26 U.S.C. 9721 12

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:

29 U.S.C. 1002(1) 3

Statutes—Continued: Page

29 U.S.C. 1002(37) (§ 3(37)) 3
Labor Management Relations Act, 29 U.S.C. 186(c)(5) 2
26 U.S.C. 4291 11
26 U.S.C. 4980B 13
26 U.S.C. 7852(a) 20
29 U.S.C. 1132(a) 13

Miscellaneous:

138 Cong. Rec. (1992):
p. 34,001 ..... 15, 18
p. 34,005 15
Nonna A. Noto, Congressional Research Service, *Coal Industry: Use of Abandoned Mine Reclamation Fund Monies for UMWA "Orphan Retiree" Health Benefits* (Sept. 10, 1992) 15

In the Supreme Court of the United States

No. 04-589

THE BRINK'S COMPANY, FKA THE PITTSTON COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 368 F.3d 385. The opinion of the district court (Pet. App. 42a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2004. A petition for rehearing was denied on August 5, 2004 (Pet. App. 66a-71a). The petition for a writ of certiorari was filed on November 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, Tit. XIX, Subtit. C, §§ 19141-19143, 106 Stat. 3036-3056 (26 U.S.C. 9701 *et seq.*) (Coal Act), "to provide coal industry retirees with the lifetime benefits they had been promised." *Holland* v. *Big River Minerals Corp.*, 181 F.3d 597, 604 (4th Cir. 1999), cert. denied, 528 U.S. 1117 (2000). The Coal Act represents Congress's response to the inadequate funding of health-care benefits promised by coal operators over a period of decades, and to the efforts of many such operators to avoid their benefits obligations by switching to non-union labor or by leaving the coal industry. See, *e.g.*, *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 511 (1998) (plurality opinion); see generally *id.* at 504-515 (providing detailed historical background of the Coal Act).

In enacting the Coal Act, Congress sought "to identify persons most responsible" for the liabilities of the underfunded private health-care benefit plans then in existence, and to provide a private funding stream "to stabilize plan funding and allow for the provision of health care benefits" to retired coal miners and their dependents. Coal Act § 19142, 106 Stat. 3037. The Coal Act created the Combined Fund, a private entity whose trustees are designated by representatives of coal miners and coal industry operators. 26 U.S.C. 9702. The Combined Fund is the product of the merger of prior benefit plans that were created by collective bargaining agreements. See 26 U.S.C. 9702(a)(2); *Eastern Enterprises*, 524 U.S. at 514 (plurality opinion). Congress specified that the Combined Fund shall be a plan described in Section 302(c)(5) of the Labor Management

Relations Act, 29 U.S.C. 186(c)(5); an employee welfare benefit plan within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(1); and a multiemployer plan within the meaning of Section 3(37) of ERISA, 29 U.S.C. 1002(37). See 26 U.S.C. 9702(a)(3). The Coal Act directs the Combined Fund to provide retired miners and their dependents with "substantially the same" health benefits as were provided under previous plans. 26 U.S.C. 9703(b)(1).

Under the Coal Act, the Commissioner of Social Security (Commissioner) assigns each eligible retired miner to a coal operator, making that operator and a broad class of "related persons" (*e.g.*, other entities under common ownership) liable to pay the Combined Fund premiums for that miner and his or her dependents. See 26 U.S.C. 9701(c)(2), 9706(a). The assignment is to a coal operator (or to any "related person" of such an operator) that "remain[ed] in business" on the Coal Act's effective date, according to the following order of preference:

(1) First, to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least two years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. 9706(a).

The Commissioner notifies the relevant signatory operator or related person of the assignment. 26 U.S.C. 9706(e)(2). The assignee may ask the Commissioner to review an allegedly erroneous assignment, and the miner is reassigned if the assignment is determined to be erroneous. 26 U.S.C. 9706(f). An assignee is subject to statutory penalties if it fails to pay premiums. 26 U.S.C. 9706(f)(5), 9707. An assignment is made for every miner under Section 9706(a) unless no former coal industry employer or related person remains in business. The health benefits of an "unassigned" miner are funded by transfers of funds from other sources or, if those sources are insufficient, from a premium imposed on the signatory operators to whom assignments have been made. 26 U.S.C. 9704(d), 9705.

2. The miners whose benefits are at issue in this case were all employed by petitioners at some point in the past. Some of those miners were originally assigned to petitioners by the Commissioner after the Coal Act was enacted. The Commissioner reassigned 95 additional

miners to petitioners following this Court's decision in *Eastern Enterprises*, which held that the Coal Act is unconstitutional insofar as it authorizes the imposition of liability on coal operators that had not signed, and were not related persons to operators that had signed, collective-bargaining agreements in or after 1974, the year that miners were first explicitly promised lifetime health benefits.[1]

In implementing the Court's decision, the Commissioner voided all assignments to coal operators, like Eastern Enterprises, that had not signed the 1974 or later agreements and were not related persons to such operators. Pet. App. 11a. The Commissioner then reassigned each such miner based on the statutory order of priority (see 26 U.S.C. 9706(a)(1)-(3)), while excluding Eastern Enterprises and similarly-situated operators from the pool of potential assignees. See Pet. App. 11a. "As a result of this reevaluation and interpretation of the Coal Act, the Commissioner reassigned to [petitioners] 95 beneficiaries whose earlier assignments had been invalidated." *Ibid.*

3. Petitioners filed suit against the United States, challenging Coal Act assignments made to them and

---

[1] Although a majority of this Court agreed that the imposition of Coal Act liability on Eastern Enterprises (which had not signed, and was not a related person to any entity that had signed, the 1974 or later wage agreement) was unconstitutional, no majority agreed on the precise rationale for that holding. Four Justices concluded that the Coal Act's application to Eastern Enterprises violated the Just Compensation Clause. 524 U.S. at 522-537 (opinion of O'Connor, J.). Justice Kennedy found that the assignments to Eastern Enterprises did not violate the Just Compensation Clause but did violate the Due Process Clause. *Id.* at 539-550 (Kennedy, J., concurring). The remaining four Members of the Court found no constitutional infirmity. *Id.* at 553-568 (Breyer, J., dissenting).

seeking a refund of premiums. Petitioners argued, *inter alia*, that (1) the Coal Act unconstitutionally vests governmental power in the private persons who administer the Combined Fund, see Pet. App. 11a, 12a; (2) the decision in *Eastern Enterprises* has the effect of invalidating the entire Coal Act because the application of the Act to Eastern Enterprises and similarly-situated operators is not severable from the remainder of the Act's applications, see *id.* at 12a, 22a; and (3) the Coal Act by its terms does not permit the reassignment to petitioners of those miners whose initial assignments were voided on the basis of the *Eastern Enterprises* decision, see *id.* at 12a, 27a.[2] Because Coal Act payments are made directly to the Combined Fund, the United States filed a third-party complaint against the Fund and its Trustees, seeking indemnification for any amounts that it might be ordered to pay to petitioners. See *id.* at 44a.

The district court granted respondents' motion for summary judgment. Pet. App. 42a-65a. The court held that the Coal Act does not effect an unconstitutional delegation of Executive power because the Act adequately constrains the discretion of the Combined Fund

---

[2] Petitioners also argued that the application of the Coal Act to them violated the Fifth Amendment. See Pet. App. 11a, 34a. That claim was rejected by the district court and the court of appeals, see *id.* at 34a-35a, 59a-60a, and petitioners do not pursue it in this Court. Petitioners also alleged that they had been overcharged for the beneficiaries assigned to them. *Id.* at 11a. That claim was ultimately settled, see *id.* at 12a, and it is not at issue here. In addition, petitioners contended that any original assignments made after October 1, 1993, were invalid by reason of the Commissioner's failure to meet that statutory deadline. The district court deferred ruling on that contention, see *id.* at 65a, which was subsequently rejected by this Court in *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149 (2003).

and its Board of Trustees. *Id.* at 47a-59a. The court further held that the applications of the Coal Act declared to be unconstitutional in *Eastern Enterprises* could be severed from the Act's remaining valid applications, *id.* at 60a-62a, and that miners originally assigned to "Eastern and Eastern-like companies" (*id.* at 64a) could validly be reassigned to operators like petitioners, *id.* at 62a-65a.

4. The court of appeals affirmed. Pet. App. 1a-41a.

a. The court of appeals held that the Coal Act does not unconstitutionally delegate governmental functions to the Combined Fund or its Board of Trustees. Pet. App. 12a-22a. The court explained that "the Coal Act or the Social Security Commissioner defines the nature of the Combined Fund and who must contribute to it; specifies the amount of each premium payable by a coal operator to the Combined Fund; specifies with particularity each beneficiary who is entitled to receive benefits from the Combined Fund; and designates the nature and amount of the benefits." *Id.* at 16a-17a. The court concluded that the functions assigned to the Trustees are sufficiently ministerial and/or advisory that they may properly be entrusted to a private entity. *Id.* at 17a-22a.

b. The court of appeals rejected petitioners' contention that this Court's decision in *Eastern Enterprises* had the effect of invalidating the entire Coal Act. Pet. App. 22a-27a. The court noted that the background presumption of severability, which applies to federal statutes generally, is reinforced by Congress's enactment of a severability clause applicable to the Coal Act. See *id.* at 24a-25. The court further explained that the Act can function independently even if Eastern Enterprises and similarly-situated operators are excluded

from the pool of potential assignees (and indeed has continued so to function since the Court decided *Eastern Enterprises* in 1998); that the Act's legislative history reflects a congressional intent to assign as many miners as possible to responsible coal operators; and that Congress has continued to appropriate funds for the implementation of the Coal Act since the decision in *Eastern Enterprises*. *Id.* at 25a-27a.

c. The court of appeals held that the Coal Act authorized the Commissioner to reassign miners whose original assignments were invalid under *Eastern Enterprises*. Pet. App. 27a-34a. The court explained that *Eastern Enterprises* had created a statutory gap, which the Commissioner had reasonably chosen to fill by "remov[ing] Eastern-like coal companies from the pool of qualified signatory operators and reassign[ing] their beneficiaries to other companies." *I*d. at 28a.

d. Chief Judge Wilkins filed an opinion concurring in part and dissenting in part. Pet. App. 37a-41a. Chief Judge Wilkins agreed with the majority that the Coal Act does not effect an unconstitutional delegation of governmental power, and that the decision in *Eastern Enterprises* does not require that the Act be invalidated in its entirety. See *id.* at 37a. He would have held, however, that miners originally assigned to Eastern Enterprises and similarly-situated operators must be treated as "unassigned" rather than assigned to particular operators such as petitioners. *Id.* at 37a-41a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The retiree health benefits plan established by the Coal Act has been in effect and paid

much-needed benefits to retired miners and their beneficiaries for more than 14 years, and for more than seven years since this Court's decision in *Eastern Enterprises*. Petitioners' efforts at this late date to invalidate the Coal Act in its entirety, or to undo the Commissioner's manifestly reasonable response to the *Eastern Enterprises* decision, lack merit. Further review is not warranted.

A. The court of appeals correctly rejected petitioners' contention (see Pet. 13-16) that the Coal Act unconstitutionally delegates governmental power to the Combined Fund and its Board of Trustees. The decision in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), represents the last occasion on which this Court has relied on nondelegation principles to invalidate a statutory provision vesting governmental authority in a private entity. The provision that was struck down in *Carter Coal* authorized private actors within the coal industry to fix the minimum wages and maximum hours of labor for coal miners. See *id.* at 310-311. This Court characterized the power conferred as the power to regulate the production of coal, which the Court held was "necessarily a governmental function." *Id.* at 311. The Court concluded that "[t]he delegation is * * * clearly arbitrary, and * * * clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." *Ibid.*

The powers vested in the Combined Fund and its Board of Trustees are not remotely comparable to the powers at issue in *Carter Coal*. The pertinent regulatory functions under the Coal Act are performed by a public official—the Commissioner of Social Security. The Commissioner assigns beneficiaries to coal operators pursuant to the statutory criteria. 26 U.S.C.

9706(a); see Pet. 6; Pet. App. 10a, 16a; *A.T. Massey Coal Co.* v. *Massanari*, 305 F.3d 226, 232 (4th Cir. 2002), cert. denied, 538 U.S. 1012 (2003). At the request of the assignee, the Commissioner may review an allegedly erroneous assignment and may reassign the miner if the initial assignment is found to be in error. 26 U.S.C. 9706(f). The Commissioner also calculates the per-beneficiary annual premiums, applying "specific formulas" set forth in the statute. Pet. App. 15a; accord 26 U.S.C. 9704(b)(2); Pet. 6 (Commissioner "calculate[s] a per beneficiary health benefit premium for each plan year"). As a result, a coal operator's liability under the Act is determined by the Commissioner pursuant to criteria established by Congress, not by the Fund or its trustees. Pet. App. 15a; accord *id.* at 17a, 21a.

Petitioners contend that the Coal Act effects an unconstitutional delegation of governmental power by authorizing the Combined Fund "to collect and spend taxes" (Pet. 16), "to sue to collect public funds" (Pet. 14), and "to write its own rules for implementing the Coal Act" (Pet. 15). Petitioners' arguments lack merit.

1. Even assuming for purposes of argument that the Coal Act premiums are "taxes,"[3] neither the collection of funds owed to a private party nor the expenditure of such funds is an inherently governmental function. Petitioners do not contest the court of appeals' conclu-

---

[3] Although some courts of appeals have characterized Coal Act premiums as taxes for some purposes (see Pet. 12), the government has consistently argued that the premium is not a tax because it is not "an enforced contribution to provide for the support of government." *United States* v. *La Franca*, 282 U.S. 568, 572 (1931). The constitutionality of the Coal Act provisions at issue here, however, does not depend on whether the premiums are properly characterized as taxes.

sion that "the power to receive taxes (premiums) and other federal revenues (which private employers do with every paycheck) does not violate the nondelegation doctrine." Pet. App. 18a-19a. To the contrary, they acknowledge that "private parties routinely collect taxes from other private parties." Pet. 2; see 26 U.S.C. 4291 (requiring the providers of certain products and services to collect federal taxes from certain purchasers). And even if Coal Act premiums were properly regarded as taxes in some constitutionally significant sense, petitioners have failed to identify any basis on which the Constitution would prohibit Congress from assigning the resulting revenue stream to a private party. Cf. *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 773-774 (2000) (analogizing *qui tam* provision to assignment of government's claim).

Private entities may also validly be authorized to spend funds collected pursuant to statutory mandate. For example, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) requires the payment of statutorily-mandated withdrawal liabilities to private pension funds, which then spend those penalties. See 29 U.S.C. 1381-1461; *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 195 (1997) (The MPPAA "requires employers who withdraw from underfunded multiemployer pension plans to pay a 'withdrawal liability' * * * by making a series of periodic payments according to a postwithdrawal schedule set by the pension fund's trustees, or [by] prepay[ing] the entire debt at any time.").[4] Similarly,

[4] Petitioners seek (Pet. 16) to distinguish the MPPAA from the Coal Act on the ground that the former codified preexisting contractual obligations, while the latter imposes a new tax. Even assuming that distinction is accurate, it is irrelevant to the question whether a private

under the Medicare statute, private entities known as "fiscal intermediaries" disburse and account for funds used in making Medicare payments. *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 54 (1984); *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 91 (1995).

2. The Combined Fund's authority to file and prosecute lawsuits to recover funds owed to it pursuant to statute is not a uniquely governmental prerogative. See Pet. App. 18a (noting that the Coal Act grants the Combined Fund "the power to sue for monies owed to itself, which is not a governmental power, but a private one"). Private actors routinely sue for money to which they allege an entitlement under federal law. Indeed, the Coal Act provision that authorizes the Combined Fund to bring suit specifically refers to the provision under which a private pension plan may sue an employer for withdrawal liability under the MPPAA. See 26 U.S.C. 9721 (referring to "section 4301 of the Employee Retirement Income Security Act of 1974"). As this Court has noted, the MPPAA authorizes private pension funds to pursue a variety of means, including the filing of lawsuits, to enforce participants' statutory payment obligations. See *Bay Area Laundry*, 522 U.S. at 197.

Petitioners' reliance (Pet. 13) on *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), is misplaced. The Court in *Buckley* addressed the constitutional status of the Federal Election Commission (FEC), which wielded "extensive rulemaking and adjudicative powers," *id.* at 110, and exercised "primary and substantial responsibility for administering and enforcing" the federal election laws, *id.* at 109. The governmental status of the

---

entity may validly be authorized to collect and spend mandatory statutory fees.

FEC was undisputed; the issue was whether that body's members could be appointed by congressional officers rather than in conformity with the Appointments Clause. See *id.* at 124-143. It was in that context that the Court struck down the statutory provisions "vesting in the [FEC] primary responsibility for conducting civil litigation in the courts of the United States *for vindicating public rights*." *Id.* at 140 (emphasis added).

The role of the Combined Fund under the Coal Act cannot plausibly be analogized to that of the FEC. Enforcement of the Coal Act on behalf of the government is entrusted to Executive Branch officials, and primarily to the Commissioner. See pp. 9-10, *supra*.[5] When the Combined Fund sues under the Act, it does so to vindicate its discrete interest as a multiemployer benefits plan in receiving the payments to which it is entitled by statute, not to vindicate the general public interest in the Act's enforcement. Nothing in *Buckley* purports (or has been construed by this Court) to cast doubt on Congress's frequent practice of creating private rights of action for persons who are injured by violations of federal statutes.

3. Petitioners offer no plausible rationale for their assertion (Pet. 15) that the Combined Fund's ability "to write its own rules for implementing the Coal Act" violates the Constitution. The Commissioner, not the

---

[5] The Secretary of the Treasury enforces the payment of Coal Act premiums through penalties that are treated as taxes. See 26 U.S.C. 9707 (providing for penalty for failure to pay Coal Act premiums, and treating that penalty as a tax under 26 U.S.C. 4980B). The Secretary of Labor enforces the proper operation of the Combined Fund as a plan under ERISA. See 26 U.S.C. 9702(a)(3) (stating that the Combined Fund is an ERISA plan); 29 U.S.C. 1132(a) (Secretary of Labor may bring suit to enforce ERISA requirements).

Fund, assigns beneficiaries to coal operators and calculates the per-beneficiary premiums pursuant to a statutory formula. The Combined Fund has the authority to establish its own internal rules, but that authority is possessed by many private entities and is not governmental in character. See Pet. App. 18a.

4. Petitioners have identified no cognizable injury to themselves resulting from any action taken by the Combined Fund or its Board of Trustees. The implementation of the Coal Act affects petitioners only to the extent that the Act itself requires them to pay premiums. Those premiums are calculated by the Commissioner pursuant to statutory direction. Petitioners have experienced no harm resulting from the Coal Act's directive that premiums be paid to the Fund rather than to the Secretary of the Treasury or the Commissioner of Social Security, or from decisions made by the Fund regarding expenditures on behalf of its beneficiaries.

B. Petitioners contend (Pet. 16-21) that the Coal Act provisions struck down in *Eastern Enterprises* are not severable from the remainder of the statute, and that the Court's decision in that case therefore effectively invalidated the Coal Act in its entirety. That claim lacks merit. "The inquiry into whether a statute is severable is essentially an inquiry into legislative intent." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); accord Pet. App. 24a. As the court of appeals explained, there is generally a "presumption that when an application of a statute is determined to be unconstitutional, courts seek to preserve as much of the statute as is still consistent with legislative intent." Pet. App. 24a; see *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). That presumption is especially strong where, as here, implementation of the relevant statute

is governed by a severability clause. See Pet. App. 24a-25a; *Alaska Airlines*, 480 U.S. at 686.

The structure of the Coal Act further refutes any inference of congressional intent to abandon the statutory enterprise solely because assignments cannot be made to Eastern Enterprises and similarly-situated coal operators. As this Court recently noted, the "congressional objective" in enacting the Coal Act was "to allocate the greatest number of beneficiaries * * * to a prior responsible operator." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 171-172 (2003) (quoting 138 Cong. Rec. 34,001 (1992) (Sen. Wallop)); accord *id.* at 172 n.15 ("[T]he Act envisioned that '[w]herever possible, responsibility for individual beneficiaries would be assigned . . . to a previous employer still in business.'") (quoting Nonna A. Noto, Congressional Research Service, *Coal Industry: Use of Abandoned Mine Reclamation Fund Monies for UMWA "Orphan Retiree" Health Benefits* (Sept. 10, 1992), *reprinted in* 138 Cong. Rec. at 34,005). In furtherance of that goal, the Coal Act requires the Commissioner to assign each miner to a coal operator remaining in business unless "no existing company falls within the [statutory] categories." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 447 (2002); accord *Peabody Coal Co.*, 537 U.S. at 164-165 (noting Congress's assumption that all "beneficiaries matchable with operators still in business" would be assigned). That objective is directly served by the assignment to petitioners of their former employees whose benefits are at issue in this case, and it would be substantially disserved by invalidation of the Coal Act in its entirety. Congress's intent to maintain the Coal Act regime in operation is further evidenced by its continued appropriations for implementation of the Act even after this

Court's decision in *Eastern Enterprises*. See Pet. App. 26a.

Petitioners contend (Pet. 19-20) that the continued operation of the benefits plan put in place by the Coal Act is inconsistent with Congress's intention to assign Coal Act liability to the specific coal operator "most responsible for plan liabilities" for each beneficiary. But while the Act sets forth a hierarchy of the coal operators to whom a particular miner may be assigned, it directs the Commissioner to consider only those operators that "remain in business." See 26 U.S.C. 9706(a). Congress clearly understood that the coal operators "most responsible" for some miners would have gone out of business, and its evident intent was to require such miners to be assigned to the most responsible coal operators to whom assignments could be made. The Commissioner's decision to treat Eastern Enterprises and similarly-situated operators in the same manner as operators who had gone out of business, and to assign their former workers to other former employers like petitioners, is far more consistent with that intent than is facial invalidation of the statutory scheme.

C. Petitioners contend (Pet. 21-22) that the Commissioner's reassignment to them of 95 individual beneficiaries, who had previously been assigned to Eastern Enterprises or similarly-situated operators, is precluded by the terms of the Coal Act. That claim lacks merit.

Section 9706(a)(3) of Title 26 states that any eligible beneficiary not assigned to an individual coal operator under Section 9706(a)(1) or (2) should be assigned "to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective

date of the 1978 coal wage agreement." 26 U.S.C. 9706(a)(3). The Coal Act defines the term "signatory operator" to mean "a person which is or was a signatory to a coal wage agreement." 26 U.S.C. 9701(c)(1). Petitioners contend (Pet. 22) that the reassignments at issue here were inconsistent with the terms of the statute because petitioners did not in fact employ the relevant miners "for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement." 26 U.S.C. 9706(a)(3). Rather, those miners were employed for longer periods by operators, like Eastern Enterprises, that had not signed the 1974 or later wage agreements but had signed prior agreements and therefore are "signatory operators" within the literal terms of Section 9701(c)(1).

The square holding of *Eastern Enterprises*, however, is that the Fifth Amendment *precludes* literal application of the Coal Act's assignment provisions to operators who did not sign the 1974 or later wage agreements. As the court of appeals recognized, the Commissioner's reassignment of the 95 miners at issue here was a reasonable means of filling the statutory gap created by this Court's decision in *Eastern Enterprises*. See Pet. App. 31a (explaining that "Congress did not contemplate that some members of the 'signatory operators' group could not constitutionally be required to contribute to the Combined Fund," and that "[t]he situation faced by the Commissioner was thus the kind of 'case unprovided for' that allows her to engage in gap-filling") (quoting *Peabody Coal Co.*, 537 U.S. at 169). Thus, "after *Eastern Enterprises* the Commissioner in fact interpreted 'signatory operators,' as used in the Coal Act and in light of the requirements of the Constitution, to include *only* operators that had signed a 1974 [wage agreement]

or later agreement." *Id.* at 30a. After eliminating Eastern Enterprises and similarly-situated coal operators from the pool of potential assignees, the Commissioner reassigned each retiree whose assignment had been declared invalid to the appropriate "signatory operator" (as thus more narrowly defined), based on the order of priority set forth in 26 U.S.C. 9706(a)(1)-(3). See Pet. App. 30a. That approach furthered Congress's intent "to minimize the number of unassigned beneficiaries by assigning each retiree to a coal operator most responsible for providing benefits." *Id.* at 32a-33a; see *Peabody Coal Co.*, 537 U.S. at 171-172 (The Coal Act "is 'designed to allocate the greatest number of beneficiaries * * * to a prior responsible operator.") (quoting 138 Cong. Rec. at 34,001 (Sen. Wallop)).

While arguing that reassignment of the 95 retirees violated the terms of the Coal Act, petitioners conspicuously fail to specify how the Commissioner *ought* to have treated those miners after the Court's decision in *Eastern Enterprises* (assuming that the Coal Act is not declared invalid in its entirety). Petitioners do not dispute that each of those individuals is an "eligible beneficiary" within the meaning of 26 U.S.C. 9706(a). Petitioners recognize, moreover, that "there is no provision authorizing the Commissioner or the Combined Fund to declare a beneficiary unassigned" in the circumstances presented here. Pet. 18; see 26 U.S.C. 9706(a) ("[T]he Commissioner of Social Security shall * * * assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business."); Pet. App. 32a n.3 (court of appeals explains that "Section 9706(a) leaves unassigned only those retirees who were *never* employed by a signatory operator that was 'in business'

at the enactment of the Coal Act"). In light of petitioners' failure to identify any alternative approach that would have fully comported with the literal requirements of the Coal Act, their textual objection to the reassignments at issue here is without force.

Petitioners also object (Pet. 22) that "[t]he reassignments are going not to the employer which employed the retiree 'for a longer period of time than any other signatory operator,' but to companies which may have employed the retiree for only few months, a few days, or even a few hours." But while the Coal Act authorizes assignment of a retired miner only to an operator that previously employed the individual (cf. Pet. App. 25a-26a), the Act does not require any minimum length of service with the particular operator as a condition of assignment. See 26 U.S.C. 9706(a)(2) and (3) (authorizing assignment to former employer regardless of the length of employment). Even apart from this Court's decision in *Eastern Enterprises*, the Act will sometimes require that a miner be assigned to a particular operator based on a very short period of prior employment if, for example, the other operators for whom the miner worked had gone out of business before the Coal Act was enacted. See Pet. App. 31a n.3 (court of appeals notes that "Congress intended to include in the [assignment] pool only those companies then 'in business'"). The practical effect of the Commissioner's approach is that operators to whom retirees may not constitutionally be assigned under *Eastern Enterprises* will be treated, for purposes of 26 U.S.C. 9706(a)(1)-(3), as though they were not in business as of the Act's effective date. See Pet. App. 31a n.3. The fact that petitioners have been assigned retirees whom they employed for short periods

of time cannot properly be regarded as an unintended consequence of the statute Congress drafted.

Finally, petitioners contend (Pet. 22) that the Commissioner's approach is inconsistent with the severability provision applicable to the Coal Act. That provision states that, "[i]f any provision of [the Act], or the application thereof to any person or circumstances, is held invalid, the remainder of the [Act], and the application of such provision to other persons or circumstances, shall not be affected thereby." 26 U.S.C. 7852(a). In petitioners' view (Pet. 22), Section 7852(a) precludes the assignment of additional retirees to remaining coal operators as a result of the Court's holding in *Eastern Enterprises*.

The court of appeals correctly rejected that argument. Pet. App. 33a-34a. As the court explained, Section 7852(a)'s directive that the Coal Act's "application" to petitioners "shall not be affected" by its invalidation as to others does not require that the *amount* of petitioners' liability must remain unchanged. *Id.* at 34a. After *Eastern Enterprises* as before, petitioners will be treated as "signatory operator[s]" to whom their former employees may be assigned, and the assignment of retirees to individual operators will be governed by the order of priorities set forth in 26 U.S.C. 9706(a)(1)-(3). The elimination of certain operators (*i.e.*, those who did not sign the 1974 or later wage agreements) from the pool of potential assignees may cause some former miners to be reassigned, but "the fact and method of applying the Coal Act to [petitioners] have not changed." Pet. App. 34a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
JONATHAN H. LEVY
Attorneys

FEBRUARY 2005